

Final Order Denying Refund: 04-20190072R
Gross Retail and Use Tax
For the Years 2013, 2014, and 2015

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

HOLDING

Indiana Retail Store Chain was not entitled to a refund of sales tax paid on the purchase of computer software purchased from out-of-state vendors and delivered to Indiana; Indiana law provided a "temporary storage" exemption for use tax but not sales tax. Indiana Retail Store Chain was not entitled to an apportioned refund of sales tax paid on the purchase of canned software based on the ratio of its in-state and out-of-state employees when the software was purchased by and delivered to its Indiana location.

ISSUE

I. Gross Retail and Use Tax - Computer Software.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(e); IC § 6-2.5-13-1(d)(1); IC § 6-2.5-13-1(d)(2); *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); [45 IAC 2.2-3-14\(2\)](#); [45 IAC 2.2-3-16](#) (repealed); [45 IAC 2.2-5-3\(b\)](#); [45 IAC 2.2-5-6\(a\)](#); [45 IAC 2.2-5-8\(a\)](#); [45 IAC 2.2-5-9\(a\)](#); [45 IAC 2.2-5-10\(a\)](#); Sales Tax Information Bulletin 8 (November 2011).

Taxpayer argues that the Department erred in denying it a refund on the purchase of computer software claiming that the software was accessed and used by many of its employees located outside Indiana.

STATEMENT OF FACTS

Taxpayer is an Indiana company which operates a nation-wide chain of retail stores. Taxpayer operates multiple locations throughout the United States including locations within Indiana. Taxpayer submitted a claim for a refund of sales tax paid on the purchase of various items of tangible personal property including computer software. The Indiana Department of Revenue ("Department") conducted a review of Taxpayer's claim and issued a "Report Summary" addressing the refund request. The Department granted a portion of Taxpayer's claim but also denied the remainder of that claim.

Taxpayer disagreed with that portion of the Department's decision denying the refund and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Final Order Denying Refund results.

I. Gross Retail and Use Tax - Computer Software.

DISCUSSION

The issue is whether Taxpayer has established that it was entitled to a refund of sales tax paid on the purchase of prewritten computer software on the ground that the software is accessed by Taxpayer's users both inside and outside Indiana.

A. Taxpayer's Burden in Claiming a Refund.

When a taxpayer challenges taxability in a specific instance, the taxpayer is required to provide documentation explaining and supporting its challenge. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana*

Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

B. Indiana's Gross Retail Tax.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). "When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location." IC § 6-2.5-13-1(d)(1). When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser . . . occurs" IC § 6-2.5-13-1(d)(2).

C. Indiana's Complimentary Use Tax.

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

In effect and practice, the use tax is generally functionally equivalent to the sales tax. See *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). However, Indiana's use tax - not sales tax - allows an exemption for the "temporary storage" of tangible personal property delivered into Indiana but destined for use outside the state. IC § 6-2.5-3-2(e).

D. Computer Software and Indiana's Sales and Use Tax.

IC § 6-2.5-1-27 incorporates "prewritten computer software" in the definition of tangible personal property subject to sales and use tax:

"Tangible personal property" means personal property that:

- (1) can be seen, weighed, measured, felt, or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.

A person who acquires property in a retail transaction (a "retail purchaser") is liable for the tax on the transaction. IC § 6-2.5-2-1(b).

E. Sales and Use Tax Exemptions.

As a general rule, all purchases of tangible personal property - including computer software - are subject to sales or use tax unless specifically exempted by statutes or regulations. [45 IAC 2.2-5-3\(b\)](#); [45 IAC 2.2-5-6\(a\)](#); [45 IAC 2.2-5-8\(a\)](#); [45 IAC 2.2-5-9\(a\)](#); [45 IAC 2.2-5-10\(a\)](#). Various tax exemptions are outlined in IC §§ 6-2.5-5 et seq. which are applicable to both sales tax and use tax. [45 IAC 2.2-3-14\(2\)](#).

A statute which provides any tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

F. Taxpayer's Software Purchases.

1. Adobe Systems Incorporated.

Taxpayer purchased computer software from Adobe Systems Incorporated. Taxpayer states that it is entitled to a refund of sales tax paid on the purchase of this software because it "is used solely by the [Taxpayer] digital products team located in [out-of-state location]." Taxpayer explains that the Adobe software "is a specialty product that allows the digital team to track various marketing platforms and build out of such."

The Department's "Report Summary" addressed Taxpayer's request for a refund of the sales tax charged on the Adobe invoices. The Summary explains:

The invoices state that the bill to and ship to locations are in [Indiana]. The [T]axpayer provided no additional documentation to state otherwise for specifics.

A review of the Adobe invoices confirms the audit's finding. Taxpayer bought, paid for, and received the software at its Indiana location. At the time it paid for the software, it paid sales tax.

At the outset, the Department points out that Taxpayer errs in its reliance on Indiana's "use tax sourcing rules . . ." because in each of the transactions under review, Taxpayer remitted *sales* tax when it paid for the software.

Ownership interest, sourcing rules, delivery location or not, the Department's guidance on this issue is found at Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA, (*superseded by* Sales Tax Information Bulletin 8 (December 2016)) which was in effect at the time of the transactions and is dispositive of the Adobe software issues raised here by Taxpayer.

Prewritten computer software maintained on computer servers outside of Indiana also is subject to tax when accessed electronically via the Internet (i.e., "cloud computing"). The accessing of prewritten computer software by Indiana residents constitutes a transfer of the software because the customers gain constructive possession and the right to use, control, or direct the use of the software.

The Bulletin is clear; remotely accessed computer software is "tangible personal property" and subject to the state's sales and use tax. Equally clear is IC § 6-2.5-13-1(d)(1) which provides that "[w]hen the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location." IC § 6-2.5-13-1(d)(1). In this case, the Department does not agree that the purchase of the software and the payments to Adobe are exempt from Indiana's sales tax.

2. Microsoft Corporation.

Taxpayer states that it is entitled to a refund of the sales tax paid on the purchase of various Microsoft computer software programs. Taxpayer states that the Microsoft "products are cloud-based solutions and are used by the retail store locations and therefore are not subject to Indiana use tax." Taxpayer requests that it receive an apportioned share of the tax paid Microsoft. Taxpayer reasons that because 96 percent of its employees are located outside Indiana, it should receive a 96 percent refund of the tax.

The software products are designated as "Azure Monetary," "SQLSvr AR ALNG," and "WinSvrStd."

The Department's audit found that the software was first delivered to and received in Indiana and that as "prewritten software" sold on the general market and delivered to Indiana, it was properly subject to Indiana's sales tax.

Taxpayer argues that this software is "electronically delivered to Indiana wherein the licensed product is subsequently shipped/access[ed]/used outside of Indiana." Taxpayer states that the software is "stored on the [T]axpayer's computer hardware outside Indiana." According to Taxpayer, "[T]he Indiana users are remotely accessing the software [and] therefore Indiana use tax would not be due."

At the outset, it should be noted that Taxpayer has provided nothing which would establish that the Microsoft software is accessed 96 percent of the time by users outside Indiana.

Taxpayer seeks a refund of sales tax which it characterizes as Indiana's *use* tax on the ground that an unenumerated number of the licenses were temporarily stored in Indiana and then assigned to locations outside the state. However, as pointed out above, in instances in which delivery of the property occurs in Indiana and the purchaser pays *sales* tax, the temporary storage *use* tax exemption is inapplicable.

In short, Taxpayer has not met its burden establishing that any portion of the Department's initial decision denying the refund was wrong. As noted in Part A above:

When a taxpayer challenges taxability in a specific instance, the taxpayer is required to provide documentation explaining and supporting its challenge. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite*, 939 N.E.2d at 1145.

Taxpayer bought and paid for computer software delivered to Indiana and paid sales tax on those purchases. Taxpayer is not entitled to a refund of that tax.

FINDING

Taxpayer's protest is respectfully denied.

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